IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I & S ASSOCIATES TRUST,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 99-4956
	:	
v.	:	
	:	
LaSALLE NATIONAL BANK, and	:	
	:	
GMAC COMMERCIAL MORTGAGE CORPORATION,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

YOHN, J. SEPTEMBER ___, 2001

Plaintiff I & S Associates ["I & S"] brings this action against defendants, LaSalle National Bank ["LaSalle"] and GMAC Commercial Mortgage Corporation ["GMAC"], seeking declaratory judgment on the validity of promissory note I (Count I) and the corresponding invalidity of promissory note II (Count II), and alleging breach of contract (Count III), negligence (Count IV), negligent misrepresentation (Count V), violation of 21 P.S. § 681, 682 *et. seq.* (Count VI) and breach of a fiduciary duty and the duty of good faith and fair dealing (Count VII). This court hears this case through its diversity jurisdiction.

Presently before the court are I &S's motion for partial summary judgment on Count I and Count III (Doc. 96) and LaSalle and GMAC's motions for summary judgment on Counts I, II, III, IV, V, VI and VII of plaintiff's amended complaint (Docs. No. 98, 149). For the reasons set forth below, I will deny plaintiff's motion for partial summary judgment on Counts I and III,

and I will grant defendants' motion for summary judgment in its entirety.

BACKGROUND

On August 7, 1997, Granite Investment I Corp ("Granite") and North Queen Street Limited Partnership ("North Queen") borrowed $8,250,000 from Boston Capital Mortgage Company Limited Partnership ("Boston Capital"). Am. Compl. [Doc. No. 127] ¶ 1. They secured this loan by a Mortgage and Security Agreement encumbering certain property located in Lancaster, Pennsylvania. *Id*. A promissory note dated August 8, 1997 ("Note I") memorialized the obligations of Granite and North Queen to repay Boston Capital. Am. Compl. Ex. B. The terms of Note I do not include a clause requiring payment of a penalty or premium for early payment of the principal amount due on the note. *Id.*

After Note I was executed, Granite and North Queen realized that the note mistakenly omitted the agreed upon prepayment penalty clause. Dft.'s Mem. in Opp'n Summ. J. (Doc. No. 110) Ex. A, Greene Dep. at 154-55. Instead, the prepayment penalty clause had been included in North Queen's mezzanine note. Dft.'s Mem Supp. Summ. J. (Doc. No. 98) Ex. B, Greene Dep. at 82. In order to remedy this mistake, Boston Capital modified Note I by issuing a second promissory note ("Note II"), dated August 8, 1997 and executed on September 3, 1997, which included the prepayment penalty clause. Ptf.'s Mem. Supp. Summ. J. (Doc. No. 96) Ex. C.

On June 30, 1998, Granite conveyed its interest in the property and assigned its obligations under Note I to North Queen. Am. Compl. ¶ 10. On July 13, 1998, plaintiff, I &S bought the property from North Queen and assumed North Queen's obligations on the mortgage, including the "promissory note." Am. Compl. Ex. E. Additionally, sometime prior to closing on

the property, Boston Capital assigned all of its rights and interests in the loan to LaSalle. Am. Compl. ¶ 13. Accordingly, on July 13, 1998, I & S owed an obligation to repay the loan to LaSalle. GMAC was the servicing agent for the lender at all relevant times. *Id.* ¶ 14.

At some point before I & S and North Queen agreed to the property sale, counsel for GMAC, Brown Rudnik Freed & Gesmer ("Brown Rudnik"), mistakenly sent counsel for I & S a copy of Note I, instead of the operative Note II. Am. Compl. ¶ 15. I & S claims to have relied on the terms of Note I, in particular the absence of a prepayment penalty clause, when it decided to purchase the property from North Queen. Id. ¶ 17.

On March 16, 1999, counsel for I & S wrote to GMAC, requesting confirmation that I & S would not be required to pay a penalty if it prepaid any of the outstanding principal balance on the note. Id., Ex. F. In a letter dated March 24, 1999, GMAC responded that it would impose a prepayment premium in accordance with the provisions of Note II. Id., Ex. G. At that point a dispute arose between LaSalle and I & S as to which promissory note provided the terms of their loan arrangement. I & S contends that Note I, which did not contain a prepayment penalty clause governed, while LaSalle contends that because Note II was the only operative note at the time of the loan assignment, its terms, which include a prepayment penalty provision, should govern.

On October 6, 1999, I & S filed a five count complaint against LaSalle and GMAC seeking a declaratory judgment as to the validity of Note I and the invalidity of Note II, and alleging breach of contract, negligence, and negligent misrepresentation. On March 12, 2001, I & S filed an amended complaint, adding two claims against LaSalle and GMAC for violation of 21 P.S. §§ 681, 682 *et. seq.* and for breach of fiduciary duty and duty of good faith and fair dealing.

STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "'Facts that could alter the outcome are "material", and disputes are "genuine" if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, "all justifiable inferences are to be drawn in [the non-movant's] favor." *Id*. However, "'[s]ummary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.'" *Ideal Dairy*, 90 F.3d at 744 (citation omitted). At the same time, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

DISCUSSION

I. Counts I & III - I & S v. LaSalle - Declaratory Relief and Breach of Contract

In Count I, plaintiff seeks declaratory relief that Note I controls the relationship between the parties. In Count III, plaintiff alleges that LaSalle breached its contract by refusing to honor the prepayment terms of Note I and by insisting that a penalty be imposed if plaintiff prepaid the loan principal. Am. Compl. ¶¶ 41, 42. LaSalle contends that it has not breached its contract with plaintiff since Note II, which contains a prepayment penalty provision, governs the terms of their loan agreement. Dft.'s Mem. Opp'n Summ. J. (Doc. 110) at 3. It is not disputed, however, that Boston Capital and North Queen, the original parties to the mortgage, believed that Note II governed their loan arrangement.

In its motion for partial summary judgment, I & S argues that the parol evidence rule bars defendants from presenting any evidence of the existence of Note II. This parol evidence argument is flawed in that even if Note I initially represented the operative contract between LaSalle and I & S, LaSalle would not be prohibited from presenting evidence that there was a second promissory note, which reflected the true agreement of the parties. The parol evidence rule does not bar the admission of extrinsic evidence when it is necessary to show that a mistake has been made and that the written terms of the contract do not reflect the true agreement of the parties. *West Conshocken Rest. Assocs., Inc. v. Flanigan*, 737 A.2d 1245, 1248 (Pa. Super. Ct. 1999). Moreover, there is evidence in the record to support LaSalle's contention that I & S had been informed by North Queen that the note it was assuming contained a prepayment penalty provision. Doc. 110, Ex. A, Greene dep. at 71, 98; Ex. D, Conroy dep. 25-26. This evidence of the oral understanding between I & S and North Queen may be admitted to show that the written

contract alleged to have been breached by LaSalle did not represent the true understanding and intention of the parties.

In making this parol evidence argument, I & S ignores the fact that a valid modification of Note I had occurred and the modified promissory note, Note II, was the contract assigned by North Queen. The only argument I & S presents as to why Note II should not govern is that the modification of Note I was not supported by valid consideration. Defendants argue that as consideration for the modification of the promissory note, North Queen was given a new mezzanine note that eliminated the prepayment penalty clause of the original mezzanine note. Dft.'s Mem. Supp. Summ. J. [Doc. 98] at 9. It is an undisputed fact that in exchange for defendants right to impose a penalty for early payment of the promissory note, North Queen obtained the right to prepay the mezzanine note without such a penalty. Under Pennsylvania law, this exchange amounted to valid consideration for the modification. *Fedun v. Mike's Case, Inc.*, 204 A.2d 776, 781 (Super. Ct. Pa. 1964) (noting that in order to properly modify a contract, a party must either assume additional obligations or renounce an existing right). As I & S has not presented any evidence indicating a genuine factual dispute as to whether the change in the prepayment penalty provisions constituted valid consideration and it is not the role of the court to determine the adequacy of such consideration, this court accepts the validity of the promissory note modification.[1] *Thomas v. Thomas Flexible Coupling Co.*, 2 A.2d 775, 778 (Pa. 1946) ("It is an elementary principle that the law will not enter into an inquiry as to the adequacy of the

[1] I & S admits that Barry Greene, counsel for North Queen, believed that consideration existed for the note modification. I & S's challenge to the validity of Note II is premised solely on the contention that the credibility of Mr. Greene should be tested by a jury. This feeble argument must fail. The existence of consideration is not a matter of credibility, rather, it is an issue of fact upon which there is not a genuine dispute.

consideration."). Therefore, I will deny plaintiff's motion for partial summary judgment on Counts I and III.[2]

Furthermore, as Note II governed the Boston Capital/North Queen and subsequently the LaSalle/North Queen loan agreement, it is Note II that I & S assumed when it was assigned North Queen's loan obligation. *Horbal v. Moxham National Bank*, 548 Pa. 394, 406 (1997) (noting that when a contract is assigned the rights of an assignee are no greater than the rights that were possessed by the assignor). I & S is bound by the terms of the prepayment penalty provision in Note II, the same terms that bound its assignor, North Queen. LaSalle's insistence on imposing a penalty if I & S prepaid the loan obligation was not a breach of contract, but rather an adherence to the terms of Note II, the contract to which LaSalle had become a party. As a result, I will grant defendants' motion for summary judgment on Counts I, II, and III of plaintiff's amended complaint.

II. Counts IV and V - I & S v. GMAC - Negligence; Negligent Misrepresentation

In Count IV, I & S alleges that GMAC breached a duty of care that it owed to I & S by negligently giving I & St the wrong promissory note. Am. Compl. ¶¶ 44 - 47. In Count V, I & S alleges that GMAC negligently represented that Note I governed the terms of the loan agreement, knowing that I & S would rely on the truth of this representation when agreeing to purchase the property from North Queen and assume the loan obligation. Am. Compl. ¶ ¶ 48 - 52.

[2] Plaintiff's statute of frauds argument is difficult to follow and irrelevant, as both Note I and Note II are in writing.

A. Liability for Negligence of Attorney

I & S bases both of its negligence claims on the fact that it received a copy of the wrong promissory note prior to closing. Am. Compl. ¶¶ 46, 50, 51. It is undisputed that GMAC itself did not send the incorrect note to plaintiff. Prior to closing GMAC had no direct conversation with I & S about the terms of the note. Rather, it was GMAC's attorney, Brown Rudnik, which was responsible for sending I & S's counsel the wrong promissory note. Therefore, any allegation of GMAC's negligence is premised on the vicarious liability of defendant for the negligence of its attorney.

As a general rule, a principal cannot be held liable for the negligence of his independent contractor. *Steiner v. Bell of Pa.*, 626 A.2d 584, 586 (Pa. Super. Ct. 1993).[3] The Third Circuit, applying Pennsylvania law, has found that an attorney acts on behalf of his client as an independent contractor and not as an employee. *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842, 853 (3d Cir. 1996). The most important factor in making the distinction between independent contractor and employee is the level of control exercised by the principal over the manner in which the work by its agent is completed. *Feller v. New Amsterdam Cas. Co.*, 70 A.2d 299, 300 (Pa. 1950). Pennsylvania recognizes that an attorney maintains exclusive control over the manner in which he or she performs legal work. *Id.* As a result, courts applying Pennsylvania law have held that the negligence of an attorney cannot be imputed to the client. *Ingersoll-Rand Equipment Corp. v. Transp. Ins. Co.*, 963 F.Supp. 452, 455 (M.D.Pa. 1997).

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[3] There is one exception to the general rule. When an independent contractor is engaged in an activity that poses a "special danger" or "peculiar risk," the employer may be liable for the negligence of its independent contractor. Clearly this exception is inapplicable to the benign attorney-client relationship. *Steiner v. Bell of Pa.*, 626 A.2d 584, 586 (Pa. Super. Ct. 1993).

The Pennsylvania cases that I & S suggests support its argument in favor of vicarious liability do not deal with the imputation of attorney negligence. Rather, the cases cited by plaintiff merely suggest that an attorney acts as an agent of his client and that a client is bound by acts performed by his attorney with authority and within the scope of his employment. *See Weiner v. Lee*, 669 A.2d 424 (Pa. Commw. Ct. 1995); *Rothman v. Fillette*, 469 A.2d 543 (Pa. 1983) (noting that the law in Pennsylvania is clear that "an attorney must have express authority to settle a cause of action," but holding that when an attorney forges his client's signature on a settlement check and the defrauded party suffers a loss, principals of equity require that the client be bound by the settlement entered into by his attorney). These cases both predate the Third Circuit's decision that an attorney is an independent contractor of his client. *McCarthy*, 80 F.3d 842. Given that Pennsylvania law considers Brown Rudnik to be an independent contractor of GMAC more than a mere agency relationship is needed to impose liability on GMAC for Brown Rudnik's negligent performance of its professional duties**.**

As there is no factual dispute that Brown Rudnik, and not GMAC, is the party responsible for the alleged negligence,[4] and Pennsylvania law provides that an attorney's negligence is not imputed to his client, I will grant GMAC's motion for summary judgment on Count IV and Count V of plaintiff's amended complaint.[5]

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[4] Plaintiff's expert, Henry Miller, claims that GMAC was independently negligent in not monitoring the work being performed by Brown Rudnik and in not assuring that I & S was aware of the terms of the loan. This argument, however, is not relevant to the claim of negligence being asserted in the complaint, namely the failure to deliver Note II.

[5] Refusing to recognize vicarious liability in this context will not leave I & S without any remedy for the harm it alleges resulted from the negligence of Brown Rudnik. In its amended complaint, I & S has brought a direct claim of negligence against Brown Rudnik. Am. Compl. ¶¶ 71 - 81. Should it be determined that Brown Rudnik was negligent, I & S may be able to obtain

B. Economic Loss Doctrine

I & S seeks to recover under negligence solely for its economic losses, particularly debt service damages, loss of market value, and rental loss damage. In Pennsylvania, however, the economic loss doctrine bars a plaintiff from bringing a negligence action solely for economic losses absent physical injury or property damage. *Ellenbogen v. PNC Bank*, 731 A.2d 175, 188 (Pa. Super. Ct. 1999).

Recently, federal courts applying Pennsylvania law have extended the economic loss doctrine to cases involving negligent misrepresentation. *North American Roofing & Sheet Metal Co., Inc v. Bldg. & Cons. Trades Council of Philadelphia & Vicinity*, CIV. A. 99-2050, 2000 WL 230214 (E.D.Pa. Feb. 29, 2000). In negligent misrepresentation cases the reach of the economic loss doctrine is limited in two instances: (1) when the misrepresentation is intentionally false and (2) when the defendant is "in the business of supplying information for the guidance of others." *Palco Linings, Inc. v. Pavex, Inc.*, 755 F.Supp 1269, 1274 (M.D.Pa. 1990).

I & S argues that the second exception to the economic loss doctrine should apply in this case. However, I & S has not presented any evidence demonstrating that GMAC, a loan servicing company, is in the business of supplying information. The fact that I & S received information from GMAC's attorney regarding this underlying loan agreement does not put GMAC in the business of supplying information for the guidance of others. GMAC is a loan servicing agent whose primary responsibility is to collect loan payments from the borrower and transmit these payments to the lender. Plaintiff has not been demonstrated that GMAC regularly goes beyond these duties and supplies information to the borrowers of the loans that it services.

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the relief it is seeking directly from Brown Rudnik.

Thus, I & S has not established an exception to prevent the economic loss doctrine from barring its negligent misrepresentation claim. As a result, the economic loss doctrine provides another reason to grant GMAC's motion for summary judgment on Counts IV and V of plaintiff's amended complaint.[6]

IV. Count VI - I & S v. GMAC and LaSalle - Violation of 21 P.S. §§ 681, 682 *et. seq.*

In Count VI, I & S alleges that GMAC violated its statutory duty to satisfy the mortgage when I & S tendered payment. Am. Compl. ¶¶ 55 - 59. In order to demonstrate a violation of 21 P.S. § 681,[7] plaintiff must prove the following: (1) he paid all sums due and owing; (2) he requested the mortgagee to satisfy the mortgage, and (3) the mortgagee failed to mark the mortgage satisfied within forty-five days of the request. 21 P.S. § 682; *O'Donoghue v. Laurel Savings Ass'n*, 728 A.2d 914 (Pa. 1999).

I & S and defendants agree that I & S has not actually paid the entire principal of the mortgage, and this would seem dispositive under *O'Donoghue*. However, the parties disagree as to whether tender, in lieu of actual payment, is sufficient under the statute. In a district court opinion affirmed by the Third Circuit, the Eastern District has held that tender of full payment by a mortgagor who is "ready, willing and able to pay" is all that the statute requires. *Levin v.*

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[6] I & S apparently concedes judgment in favor of defendant on its pure negligence claim, as I & S has offered no argument as to why the economic loss doctrine should not bar its negligence claim in Count IV.

[7] "Any mortgagee . . . having received full satisfaction and payment of all such sum and sums of money as are really due to him by such mortgage, shall, at the request of the mortgagor, enter satisfaction . . . which shall forever discharge, defeat and release the same . . .." 21 P.S. § 681.

Weissman, 594 F. Supp. 322, 327 (E.D.Pa. 1984), *aff'd*, 760 F.2d 258 (3d Cir. 1985). Thus, under this case law authority, if the letters written by I & S requesting a payoff schedule are evidence of a readiness to tender payment (which I doubt), I & S is able to demonstrate the first requirement for establishing a violation of 21 P.S. § 681. However, it is not necessary for me to decide whether I agree with this interpretation of the statute.

Assuming that I & S is found to have tendered payment of the mortgage, a statutory violation claim still cannot succeed because I & S has failed to demonstrate the second requirement for establishing a violation of § 681, namely that I & S requested LaSalle to satisfy the mortgage. In *O'Donoghue v. Laurel Savings Ass'n*, the Pennsylvania Supreme Court found that "the statute does not automatically obligate a mortgagee to mark the mortgage satisfied upon receipt of all money due." 728 A.2d 914, 917 (Pa. 1999). Instead, the obligation arises only after a mortgagor affirmatively makes his or her desire to have the mortgage marked satisfied known to the mortgagee. *Id.* I & S admits that it did not affirmatively request that defendants satisfy the mortgage. I & S simply argues that by insisting on a prepayment penalty, defendants frustrated I & S's efforts to tender the balance of the mortgage principal and as a result prevented it from requesting satisfaction. Dft's Mem. Supp. Summ. J. on Counts VI and VII [Doc. No. 149], Ex. H. Although this may be true, it does not change the fact that I & S failed to request LaSalle to mark the mortgage satisfied. I & S cannot demonstrate facts that would allow a reasonable jury to find that defendants violated 21 P.S. § 681, and therefore judgment will be entered for defendants on count VI of plaintiff's amended complaint.

VII. Count VII - I & S v. GMAC and LaSalle - Breach of Fiduciary Duty and Duty of Good Faith and Fair Dealing

I & S asserts that defendants owed them a fiduciary duty and a duty of good faith and fair dealing in its relationship with plaintiff. Am. Compl. ¶¶ 67-70. I & S claims that defendants breached its duties when Brown Rudnik provided the incorrect promissory note to I & S, and when defendants refused to allow I & S to renegotiate the terms of the lease on the mortgaged property. Am. Compl. ¶¶ 68, 69.

Under Pennsylvania law, the lender-borrower relationship ordinarily does not create a fiduciary duty. *Federal Land Bank of Baltimore v. Fetner*, 410 A.2d 344, 348 (Pa. Super. Ct. 1979). However, if a creditor "gains substantial control over the debtor's business affairs," a fiduciary relationship may result. *Blue Line Coal Co. v. Equibank*, 683 F.Supp. 493, 496 (E.D.Pa. 1988) (quoting *Stainton v. Tarantino*, 637 F.Supp. 1051, 1066 (E.D.Pa. 1986)). "Control over the borrower is demonstrated when there is evidence that the lender was involved in the actual day-to-day management and operations of the borrower or that the lender had the ability to compel the borrower to engage in unusual transactions." *Temp-Way Corp. v. Continental Bank*, 139 B.R. 299, 318 (E.D.Pa. 1992).

I & S cites examples of defendants' strict adherence to the loan documents as evidence of defendants' control over I & S's operations. Ptf.'s Mem. Opp'n Summ. J. on Counts VI and VII [Doc. No. 154] at 5. However, as lender, defendants were not required to modify the existing loan documents at I & S's request. Moreover, I & S's request to replace the property's tenant was not obstinately denied. Rather, counsel for defendants responded that such a request would be considered once plaintiff provided pertinent information, such as the proposed tenant's name

and financial status. Dft.'s Mem. Supp. Summ. J. on Counts VI and VII [Doc. 149], Ex. L. Given that the lease on the property provided security for the over 8 million dollar loan, defendants' request for such details of a potential replacement tenant does not amount to substantial control over I & S's daily operations. *James E. McFadden, Inc. v. Baltimore Contractors, Inc.*, 609 F.Supp. 1102, 1108 (E.D.Pa. 1995) (finding that action taken by a creditor to minimize its risk on a loan does not constitute total and absolute control over the debtor). Thus, I & S has failed to present evidence of substantial control which would create a fiduciary relationship with defendants. Moreover, even if such actions did create a fiduciary duty, there is not a scintilla of evidence of a breach of that duty since plaintiff never pursued its initial letter request for approval of a new tenant.

Assuming for these purposes that Pennsylvania recognizes an independent cause of action for a breach of the duty of good faith and fair dealing, this duty was obviously not breached by the defendants. Defendants did not refuse I & S's request for consideration of a replacement tenant. Defendants simply requested that I & S provide information about the proposed tenant. I & S never responded to defendants' request, nor did I & S ever actually propose a replacement tenant for the property.

In addition, the contention that defendants breached their fiduciary duty and duty of good faith and fair dealing by sending the wrong note is without merit. At the time that Brown Rudnik sent the wrong note to I & S there was no contractual relationship between the defendants and I & S. The absence of a contractual relationship between defendants and I & S clearly indicates that there was no fiduciary duty to be breached by defendants and no duty of good faith and fair dealing at the time that the wrong note was sent. I & S has failed to produce any evidence that

defendants breached a duty owed to I & S, and as a result, I will grant defendants' motion for summary judgment on Count VII of plaintiff's amended complaint.

CONCLUSION

For the reasons stated, the court will deny plaintiff's motion for summary judgment on Counts I and III. The court will grant defendants' motion for summary judgment with respect to Counts I, II, III, IV, V, VI, and VII.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

I & S ASSOCIATES TRUST,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION
LaSALLE NATIONAL BANK and	:	
GMAC COMMERCIAL MORTGAGE	:	NO. 99-4956
CORPORATION	:	
Defendants.	:	

Order

And now, this day of September, 2001, upon consideration of the amended complaint (Doc. 127); the plaintiff's motion for partial summary judgment on Counts I and III and memorandum in support therein (Doc. 96); defendants' response; and plaintiff's reply; it is hereby ORDERED that plaintiff's motion for partial summary judgment is DENIED.

Upon consideration of the motion of defendants, LaSalle and GMAC, for summary judgment on Counts I, II, III, IV, and V and memorandum in support therein (Doc. 98); plaintiff's response; and defendants' reply; it is hereby ORDERED that defendants' motion for summary judgment is GRANTED and judgment is entered in favor of LaSalle as to Counts I, II, and III, and in favor of GMAC as to Counts IV and V of plaintiff's amended complaint. It is hereby

declared that Note I is invalid and that Note II is the valid and operative note between the parties.

Upon consideration of the motion of defendants, LaSalle and GMAC, for summary judgment on counts VI and VII of plaintiff's amended complaint (Doc. 149); and plaintiff's reply; it is hereby ORDERED that defendants' motion for summary judgment is GRANTED and judgment is entered in favor of LaSalle and GMAC as to Counts VI and VII of plaintiff's amended complaint.

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William H. Yohn, Jr., Judge